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No. 479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.....

ADOLPH HOHENSEE, *Petitioner*,

v.

AKRON BEACON JOURNAL PUBLISHING CO., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner respectfully prays that writ of certiorari issue to review a decision of the United States Court of Appeals for the Sixth Circuit, holding that petitioner's complaint and amended complaint failed to state a cause of action within the meaning of 15 U.S.C., Sections 1, 2 and 15, commonly known as the "Sherman Act", and the "Clayton Act".

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit

is reported at 277 F.2d 359, and is also appended at page ... of the appendix.

The opinion of the District Court dismissing the complaint, and refusing leave to file a proffered amended complaint, were affirmed by the Court of Appeals, and is reported at 171 F. Supp. 90, and 174 F. Supp. 450.

JURISDICTION

The judgment of the Court of Appeals was entered May 13, 1960, and is included in the appendix at page 20. The time for filing petition for writ of certiorari in this Court was extended to and including September 19, 1960, by an order of this court dated August 10, 1960 and thereafter, to and including October 10, 1960.

Jurisdiction is invoked here under 28 U.S.C. 1254(1). Jurisdiction below was based upon Sections 1, 2, and 15 of 28 U.S.C., the "SHERMAN ACT", as amended.

QUESTIONS PRESENTED

1. Whether the refusal of the District Court to permit petitioner to file his amended complaint contravened the provisions of Rule 15(a) of the Federal Rules of Civil Procedure?

2. Whether a complaint for injury by a private party under Section 4 of the Clayton Act is sufficient if it states violations of the Anti-Trust laws and injury thereby?

STATUTES INVOLVED

The Statutory provisions are Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2 and Section 4 of the Clayton Act, 15 U.S.C. 26, together with Rule 15(a) of the Federal Rules of Civil Procedure. These are printed in the appendix.

STATEMENT

Petitioner's complaint was filed on October 8, 1958. The respondents filed their respective motions to dismiss the

complaint, thereafter, and the District Court entered its judgment under date of February 25, 1959, granting the respondents motions to dismiss the original complain. The said judgment reserved to the petitioner the right to file a motión for leave to file an amended complaint accompanied by the proposed amended pleading and a certification showing that copies thereof had been served on the defendants except defendant, Medical Association. The opinion of the said District Court in this respect is reported at 171 F. Supp. 90.

That pursuant to the directive of the District Court petitioners, on March 9, 1959, filed his motion for leave to file "Proposed amended complaint, with Amended Complaint attached", and served copies thereof on his adversaries as directed.

The proposed amended complaint alleges that the respondents, the various Medical Associations, Newspapers, Publishers, Better Business Bureaus and others, constituted parties who had a common interest in a design to injure and destroy petitioner as an individual and as a member of the public, by restraining the interstate trade and commerce of plaintiff in lecturing, public relations, the sale and shipment of food products, and the sale and shipment of other products.

The amended complaint details many of the conspiratorial acts of the respondents and alleges consequential damages to the petitioner as a member of the public and to his business. On June 9, 1959, the District Court entered judgment over-ruling petitioner's motion for leave to file his amended complaint and dismissed the action. The opinion of the Court in this respect is reported at 174 F. Supp. 450.

Thereupon an appeal was prosecuted to the Court of Appeals for the Sixth Circuit. The Court of Appeals in

affirming the judgment of the District Court, made no reference to the latter Court's opinion reported at 174 F. Supp. 450. The Court of Appeals therefore did not discuss whether or not the Amended Complaint stated violations of the Anti-Trust laws. It chose, rather, to attempt if it could to discover, without examination of the violations charged, a prejudicial effect on the public. Failing in such search, it prevented petitioner from obtaining a trial by jury under Section 4 of the Clayton Act.

REASONS FOR GRANTING THE WRIT

I

THE DECISIONS OF THE COURTS BELOW VIOLATE THE PROVISIONS OF RULE 15 (a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Since there were no responsive pleadings filed at the time petitioner proffered his amended complaint the Court, he was entitled as a matter of right to file his amended complaint, effective against all adversaries who had not filed responsive pleadings.

The Courts have held that Motions to dismiss and motions for summary judgment are not responsive pleadings within the meaning of said Rule 15(a). See, *Whitmore v. Continental Mills* (D.C. Me., 1951), 98 F. Supp. 387, *Van Dette v. Aluminum Air Seal Mfg. Co.* (D.C.N.D. Ohio, 1951), 11 F.R.D. 558, *Porter v. Mantaldo* (D.C.N.D. Ohio, 1946), 71 F. Supp. 372 and *Porter v. Mickelberry* (D.C.N.D. Ill.), 9 F.R. Serv. 12E 54, Case 1.

The refusal, therefore, of the lower Courts to permit petitioner to file his amended complaint violated Rule 15(a) of the Federal Rules of Civil Procedure.

II

IN RULING THE COMPLAINT AND AMENDED

COMPLAINT MUST SET FORTH ALLEGATIONS SHOWING "PUBLIC INJURY" THE LOWER COURTS HAVE DEPARTED FROM THE ACCEPTED TRADITION AND ARE IN CONFLICT WITH THE GENERAL RULE THAT A PRIVATE PARTY NEED ONLY ALLEGE VIOLATIONS OF THE ANTI-TRUST LAWS AND INJURY THEREBY.

It is submitted that prior to 1950, and the case of *Federson Motors, Inc.*, v. *Ward*, 10 Cir., 1950, 180 F.2d 519, on a review of a motion to dismiss, that once it was established that defendants were not exempt from the Anti-Trust Laws, and that allegations of interstate Commerce were sufficient, that the Court would determine if the complaint alleged violation of the Anti-Trust laws. This is all that Section 4 of the Clayton Act says it should do. "That any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws . . .". The *Federson* case, however, established an additional requirement that the complaint convince the Court of an inherent prejudice to the public. But the great weight of authority since 1890 has held that the only requirements for a private person under this section to state a cause of action are (1) to allege violations and (2) to allege injury thereby.

As early as 1907 the Third Circuit stated in *Wheeler Steazel Co.* v. *Nat'l Window Glass Jobbers' Ass'n.* 152 Fed. 874, that "It is manifestly the correct understanding of the Seventh Section of the Act that where a man is harmed in his business or property by a violation of the Act, he has suffered a legal injury and is entitled to his action therefor".

And the First Circuit in *Albert Peck Barth Co.* v. *Mitchell Woodbury Corp.*, 57 F.2d 96, in 1932, stated: "To constitute an offense under Section 1 of the Sherman Act, it is not necessary, if a conspiracy is proven, the purpose and

intent of which was to eliminate by unfair means a competitor in interstate commerce, to show the public was affected and to what extent".

In *Monarch Tobacco Works* v. *American Tobacco Co.*, the Circuit Court in Kentucky stated in 1908, 165 Fed. 774, 777: "All that is necessary to support the action is that business or property of the complainant shall have been in some way injured by reason of the illegal scheme".

And the Second Circuit in *Gardella* v. *Chandler*, 172 F.2d 402, held in 1949, that a baseball player was entitled to a trial by jury under the Sherman Act when the baseball league prevented the plaintiff from obtaining employment in its rank after a flight to Mexico.

Indeed the instant opinion of the Sixth Circuit is not only in conflict with the foregoing decisions of other circuits and this court, but it is in conflict with its own decision. Then Judge Lurton speaking for the Sixth Circuit in 1903, in *City of Atlanta* v. *Chattanooga Pipe and Foundry*, 127 Fed. 23, 27, affirmed 203 U.S. 390, 27 S. Ct. 65, 51 L.Ed. 241, said: "Congress evidently foresaw the wholesome effect of pecuniary responsibility for injuries resulting from such forbidden combinations and the courts should not devitalize the remedy by strained interpretations calculated to encourage disregard of law. The act gives the remedy to any person injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by the act."

A landmark private action case is that of *Roseland* v. *Phister*, 7 Cir. 1942, 125 F.2d 417, where it was held that a cause of action was stated by an agent of the defendant principal who conspired to deprive him of his job opportunities.

That the circuits are in clear conflict over the new doctrine of Public injury may be seen in *National, etc.*, v. *Na-*

tional Auto, etc., 91, U.S. App. D.C. 313, 200 F.2d 359, 360, where the District of Columbia Circuit stated: "We think it might be determined as a matter of law that the broad trade boycott here alleged is reasonably calculated to prejudice the public interest. However that may be, we think it is not necessary to make specific allegations of proof of public injury in order to show that a trade boycott of such breadth violates the Sherman Act".

There is a clear conflict between the Sixth Circuit and the District of Columbia Circuit.

This Court has recently set at rest any misapprehension as to what is the law. Thus in the case of *Radovich* v. *Nat'l Football League*, 352 U.S. 445, 453 (1957), the Court in sustaining the complaint said: "The test as to sufficiency laid down by Mr. Justice Holmes in *Hart* v. *B. F. Keith, etc.*, 262 U.S. 271, 274 (1923), is whether the claim is wholly frivolous. While the complaint might be more precise in its allegations concerning the purpose and effect of the conspiracy, we are not prepared to say that nothing can be extracted from this bill that falls under the Act of Congress. Petitioner's claim need only be tested under the Sherman Act's general prohibition on unreasonable restraints of trade: *Times Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 614 (1953), and meet the requirement that petitioner has thereby suffered injury. Congress has by legislative fiat, determined that such prohibited activities are injurious to the public, and has provided sanctions allowing private enforcement of the anti-trust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public".

CONCLUSION

If Section 4 of the Clayton and Sections 1 and 2 of the Sherman Act are susceptible to such evisceration, they be-

come a share for the dissipation of time and money by unwary private litigants. If the Congressional mandate embodied in said Sections is to retain vitality this Court's attention is needed. A writ of Certiorari should accordingly be granted.

Respectfully submitted,

JAMES C. NEWTON
1934 8th Street, N.W.
Washington 1, D. C.
Attorney for Petitioner

APPENDIX

Civil No. 34,891

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION.

ADOLPH HOHENSEE,
Plaintiff,

v.

AKRON BEACON JOURNAL PUBLISHING CO. ET AL.,
Defendants.

RELEVANT DOCKET ENTRIES

10 27 58 Complaint filed. Summons issued. 15 copies of summons with 15 copies of complaint to U. S. Marshal.

11 17 58 Motion of The Brush-Moore Newspapers, Inc. and John G. Green to dismiss filed. Copies mailed to pltf. (Refer to brief filed by Beacon Journal, et al.)

11 17 58 Motion to dismiss by the Defendant W. J. Hine filed. Copies mailed 11 15 58.

11 19 58 Motion of defendant Better Business Bureau of Akron, Inc. to dismiss filed. Copy mailed 11 18 58.

11 22 58 Answer of Summit County Medical Society and members served filed. Copies mailed.

11 24 58 Special appearance and motion of Defendant American Medical Association to quash service and to dis-

miss the complaint as to it with affidavit and memo. in support filed. Copy mailed 11/24/58.

2/25/59 Order granting motions to quash and dismissing complain as to deft. A. M. A.; motions of all movant defendants to dismiss granted, leave file amended complaint denied; plaintiff granted 10 days to move for leave to file amended complaint filed, McNamee, J. Copies to Hohensee, McDowell, Buckingham, Vodrey, Milligan, Lansdale, Myers.

2/25/59 Motion of Summit County Medical Society and members for a summary judgment filed. Copy mailed 2/24/59.

3/9/59 Motion of plaintiff to file amended complaint filed. Copies mailed 3/6/59.

6/9/59 Memo. of opinion filed, McNamee, J. (plaintiff's motion for leave to file an amended complaint is overruled and action is dismissed at plaintiff's costs; motion of defendant Summit County Medical Society for summary judgment is granted). Copies mailed to Hohensee, McDowell, Jr., Lansdale, Parsons, Myers, Vodrey, Jr. and Milligan, Jr.

6/15/59 Order granting motion of defendant Summit County Medical Soc. for summary judgment; that plaintiff's motion for leave to file an amended complaint is overruled and that the complaint is dismissed at plaintiff's costs filed, McNamee, J. Copies to plaintiff and Parsons.

7/7/59 Notice of plaintiff of appeal filed. Copy mailed C. Blake McDowell, Jr., John Lansdale, Jr., Dwight Parsons, Robert L. Myers, William H. Vodrey, Jr., Leroy J. Contie 7/7/59.

7/15/59 Supplement to notice of appeal by plaintiff filed. Copies mailed to all counsel.

COMPLAINT

(Filed Oct. 27, 1958.)

1. This action arises under the anti-trust laws

U. S., more particularly the Sherman Anti-trust Act, 15 U.S.C., Sec. 1, 2 and the Clayton Act, Sec. 15, as hereinafter more fully appears.

2. The ground upon which the jurisdiction of this Court depends is that this is an action to protect trade and commerce against restraints and monopolies.

3. The conspiracy herein complained of covers the period beginning with June 15, 1958, to the date of the filing of the instant action.

4. Plaintiff is and at all time mentioned in this Complaint was engaged in inter-state trade and commerce, in the following businesses:

a. Lecturing.
b. Public relations.
c. Selling of food products.
d. Selling of other products.
e. Publishing, writing and distributing books; periodicals and other publications.
f. Other Businesses.

5. Defendants at all time during the stated periods herein indicated, conducted a conspiracy against plaintiff in restraint of trade and commerce between the several states, consisting of the following overt and unlawful acts:

a. Libel.
b. Slander.
c. Destruction of businesses.
d. Other unlawful overt acts.

6. Defendants, in performance of said overt acts, in furtherance of the conspiracy, unlawfully slandered and libeled plaintiff on numerous occasions, such as the deliberate erroneous, distorted, garbled and libelous newspaper

articles published in the Canton Repository on [illegible] 1958, page 21, entitled "You Need a Machine," [illegible] on June 19, 1958, page 28 entitled "Pamphlet, Business Brisk"; and the article published in the American Journal, October 16, 1958, entitled "Nutritionist [illegible] With Law, AMA"; and other unlawful overt acts [illegible] plaintiff, to restrain and hinder said interstate [illegible] commerce. Said articles are made a part hereof by reference.

7. As a result of said conspiracy to restrain [illegible] trade and commerce, plaintiff was directly [illegible] damaged as follows:

a. Destruction of [illegible] business;

b. Destruction of [illegible] said business;

c. Injury to [illegible] health;

d. Loss of [illegible] and profits;

e. [illegible] and damages;

all amounting to treble damages in the sum of [illegible] dollars ($[illegible]).

[illegible]

[illegible]

[illegible]

ORDER GRANTING MOTIONS TO DISMISS

(Filed Feb. 25, 1959.)

Upon consideration,

It Is Ordered that the motions of the American Medical Association to quash and to dismiss are hereby granted and the complaint is hereby dismissed as to Defendant American Medical Association;

Further, It Is Ordered that the motions of Defendants Beacon Journal Publishing Company (erroneously named as Akron Beacon Journal Publishing Company), John S. Knight, Robert Feldkamp, Better Business Bureau of Akron, Inc., Brush-Moore Newspapers, Inc., J. G. Green and W. J. Hine to dismiss are granted and plaintiff's request for leave to file an amended complaint is hereby overruled;

Further, It Is Ordered that plaintiff may, within ten days, file a motion for leave to file an amended complaint accompanied by the proposed amended pleading and a certification showing that copies thereof have been served on all moving defendants except Defendant American Medical Association.

[illegible]

[illegible] District Judge

MOTION FOR LEAVE TO FILE PROPOSED AMENDED COMPLAINT WITH AMENDED COMPLAINT ATTACHED

(Filed Mar. 9, 1959.)

Comes now plaintiff, Adolph Hohensee, plaintiff herein, pursuant to Rule 15 (a) of the Federal Rules of Civil Procedure and the order of this Court, entered on February 25, 1959, and moves the court for leave to file an Amended

Complaint and attaches hereto and tenders to the court its proposed Amended Complaint.

Submitted without argument.

ADOLPH HOHENSEE, *Pro se*

March 6, 1959.

AMENDED COMPLAINT

Comes now Plaintiff, Adolph Hohensee, with leave of court first sought and tendered to the court for its consideration and approval, his Amended Complaint, as follows:

Jurisdiction

1. This Amended Complaint is filed and these proceedings are instituted against the above named defendants under sections 3, 4 and 7 of the Act of Congress of July 2, 1890, Sec. 647, 26 Stat. 209, as amended, entitled, "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," said Act being commonly known as the "Sherman Act," 15 U.S.C., Sections 1, 2 and 7.

2. Plaintiff, for a long time prior to, during and after the conspiratorial acts hereinafter enumerated, was and is a citizen of the United States, and was gainfully engaged in interstate trade and commerce, in the conduct of the business of lecturing, public relations, sale of food products, publication, writing, and the distribution of books, literature and other interstate trade and commerce.

Description of Defendants

3(a) The defendant, Beacon Journal Publishing Company, is a corporation engaged in the publication of the "Akron Beacon Journal," published daily in Summit County, at Akron, Ohio, and engaged in other publishings.

(b) The defendant, John S. Knight, is a citizen of the

United States and a resident of Summit County, Ohio.

(c) Defendant, Robert Feldkamp, is a citizen of the United States, a resident of Summit County, Ohio.

(d) Defendant, Summit County Medical Society, by and through its officers and members, the defendants, Donald Minning, Arthur Dobkin, Frank McDonald and Millard Bayer, and also officers and members of the American Medical Association, are sued as a class and as individuals.

(e) Defendant, Summit County Medical Society, Inc., a corporation, is a local medical society, doing business in Summit County, Ohio, in Akron.

(f) Defendant, Better Business Bureau of Akron, by and through its officers and members, the defendants, John Doe 9, John Doe 10, John Doe 11 and John Doe 12, are residents of Summit County, Akron, Ohio, and are sued as the representatives of the class and in their individual capacities.

(g) The defendant, Better Business Bureau of Akron, Inc., is a corporation, engaged in publication and other business in Summit County, at Akron, Ohio.

(h) Defendant, Brush Moore Newspapers, Inc., is a corporation, engaged in the publication of the "Canton Repository," a daily newspaper published at Canton, Ohio, within the Eastern Division of the Northern District of Ohio.

(i) Defendant, J. G. Green, is a citizen of the United States, a resident of Canton, Ohio.

(j) Defendant, W. J. Hine, is a citizen of the United States, a resident of Canton, Ohio.

(k) That the identities and whereabouts of John Doe No. 13 through John Doe No. 487, are not now known to the plaintiff. Plaintiff states that as their identities and whereabouts become known to him, prior to the trial of the issues herein, he will cause summons to be served upon them.

That the foregoing defendants together with other co-conspirators, as well as the "John Does" referred to in the

caption constitute parties who have combined themselves together and have a common interest in a consummated design to injure and destroy this plaintiff as an individual and as a member of the public, and his usefulness to the public, and to destroy the right of the public, including the right of the plaintiff as a member of the public to carry on and engage in interstate trade and commerce, as appears more fully hereinafter, thus causing substantial injury to the public.

Conspiratorial Offenses Charged

4. That during the period covering June 14, 1958 to October 27, 1958, the above defendants, and each of them, and other co-conspirators, have been and now are engaged in a combination and conspiracy, and in so doing have combined and conspired together in violation of sections 1, 2, 3, 4 and 7 of the said "Sherman Act."

(a) To restrain the interstate trade and commerce of the public, and of this plaintiff as a member of said public, in lecturing, public relations, the sale and shipment of food products, the sale and shipment of other products.

(b) The foregoing defendants together with other co-conspirators have combined and conspired, in violation of the said Sherman Act to restrain the public's rights, and the rights of this plaintiff as a member of the public, from speaking in auditoriums and other places on nutrition, foods and other products shipped through interstate trade and commerce, by illegally conspiring to shadow, screen, distort and discredit the speeches and lectures to the public, including the speeches and lectures of this plaintiff. And by performing the acts and engaging in conduct hereinafter and hereinbefore alleged, the defendants and their co-conspirators have continuously planned and acted together to discourage and prevent members of the public from traveling, both interstate and intrastate, from attending such lec-

tures and speeches conducted by plaintiff, and from buying said products sold by plaintiff. That the aforesaid illegal combination and conspiracy, and the acts, agreements, and understanding which formed a part of, and were used in effectuation thereof, have been carried out by diverse means and methods including those hereinbefore enumerated and others hereinafter described.

(c) That for many years prior to, and during the period covering June 15, 1958, to October 27, 1958, and thereafter, defendants had been engaged in a concerted effort to destroy all who dared to lecture on nutrition and the sale of products, including this plaintiff as a member of the public, and said defendants have confederated in various and sundry methods to effectuate their purposes in the prevention of members of the public from the attendance of such speeches and lectures. All in violation of the Sherman Act as aforesaid.

5. That in pursuance of, and in furtherance of the foregoing combination and conspiracy, agreements and understandings, each and all of the defendants and their co-conspirators have, with such malicious and unlawful intent, during the period from June 15, 1958, to October 27, 1958, interfered with and prevented plaintiff from conducting his lectures, speeches, sale of products shipped in interstate trade and commerce, in that in Canton, Ohio, defendant, W. J. Hing, and his co-conspirators harassed, intimidated and threatened plaintiff, thereupon stating to plaintiff that if he, the plaintiff, did not discontinue his lectures and speeches and sale of products shipped in interstate commerce, he, the said defendant, would throw him, the plaintiff, out of Canton, Ohio. That said defendant continued to harass and threaten plaintiff and embarrass plaintiff's audience, and as a result of same, plaintiff was compelled to discontinue his said lectures, speeches and sale of prod-

ucts in Canton, Ohio, all to the great damages of plaintiff. That thereupon plaintiff transferred his said lectures and speeches to Akron, Ohio, where as a member of the public he sought to engage in his interstate trade and commerce, of lecturing and speaking on nutrition and the sale of products shipped in interstate trade and commerce, together with the distributions of literature shipped in interstate trade and commerce.

6. That in pursuance of the said combination and conspiracy, and in furtherance of the said agreements and understandings of the said defendants, and while the plaintiff was conducting a series of lectures, as aforesaid, the said defendants continued to harass, embarrass him, and continued to threaten him, and did unlawfully shadow, screen and distort the true values of his said lectures, and did resort to unlawful and unfair methods in discouraging the public from attending his said lectures. That in furtherance of the said combination and conspiracy the said defendants did slander and cause certain libelous articles to be published and circulated of and concerning plaintiff's evaluation of plaintiff's products shipped in interstate trade and commerce, for the sole purpose of restraining the public and the plaintiff as a member of the public from shipping in interstate trade and commerce products subject to public comment, after shipment, as having value. All of the foregoing was in violation of the said provisions of the said Sherman Act. That thereafter, as a result thereof, plaintiff was forced to discontinue his lectures in Akron, Ohio.

7. As a result of the foregoing combination and conspiracy in restraint of interstate trade and commerce, the public was directly and indirectly substantially injured and damaged, and the plaintiff as a member of the public was injured and damaged as follows:

a. Destruction of lecture business.

b. Destruction of products sale business.

c. Destruction of health.

d. Loss of freedom and liberty.

e. Other losses, injuries and damages.

all amounting to treble damages in the sum of ten million dollars ($10,000,000.00).

WHEREFORE, Plaintiff Prays:

1. That the acts of the defendants hereinbefore described constitute a combination and conspiracy in restraint of trade and commerce in violation of sections 3 and 7 of the said Sherman Act.

2. That the defendants and each of them; and each and all of their respective officers, directors, managers, agents, employees, and all persons acting or claiming to act on behalf of them, or any of them, be perpetually enjoined, individually and collectively, from further engaging in, agreeing to perform, or in fact performing, said conspiracy or any part thereof, or any other conspiracy of like character or effect, or any of the acts, agreements, understanding, or concert of action described in this amended complaint.

3. For judgment of this Court against defendants, and each of them, for treble damages in the sum of ten million dollars ($10,000,000.00), with interest thereon from June 15, 1958, together with counsel fees and costs.

4. That the plaintiff have such other, further general, and different relief as the case may require, and the court may deem just and proper in the premises.

ADOLPH HOHENSEE, *Pro se.*

March 6, 1959.

ORDER

(Filed June 15, 1959.)

Upon consideration,

IT IS ORDERED that the motion of the defendant for sum-

mary judgment, treated as a motion to dismiss, is hereby granted.

FURTHER, IT IS ORDERED that plaintiff's motion for leave to file an amended complaint is overruled.

IT IS, THEREFORE, ORDERED that the complaint herein is hereby dismissed at plaintiff's costs.

CHARLES J. McNAMEE,
United States District Judge.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 14,031

Filed May 13, 1960, CARL W. REUSS, *Clerk*

ADOLPH HOHENSEE, *Appellant,*

vs.

AKRON BEACON JOURNAL PUBLISHING COMPANY, ET AL., *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Decided May 13, 1960

Before: SIMONS, Senior Judge, WEICK, Circuit Judge, and HOLLAND, District Judge.

PER CURIAM. The appellant, as plaintiff, wanted $10,000,000 in treble damages from numerous defendants, with interest, counsel fees and costs, for injuries growing out of an alleged conspiracy to violate the Sherman Anti-Trust Act, as amended. He listed as defendants: the American Medical Association, its officers and members, the Akron Beacon Journal Publishing Company, John S. Knight and Robert Feldcamp, the Summit County Medical Society, its officers and members, the Better Business Bureau of Akron, the Brush-Moore Newspapers, Inc., W. J. Hine, and some five hundred "John Does". The asserted damages are alleged to flow for libel, slander, destruction of businesses, and other "unlawful overt acts". The complaint recites, without supporting facts, destruction of a lecture and products' sale businesses, injuries to health, loss of freedom and liberty, and other injuries. The recitals of the complaint alleged no more than vague conclusions, capable of no intelligent response.

Upon examination of the complaint and of various motions to dismiss, the Court concluded that it lacked jurisdiction of the subject matter and that the complaint failed to state a claim upon which relief could be granted. The Court ordered the action dismissed as to all defendants on the ground that the plaintiff had failed to allege facts from which it may reasonably be inferred that the public has suffered injury, pointing out that injury to the public must specifically be stated and constitute a restraint of interstate commerce. Its opinion, 171 Fed. Supp. 90, is clear and supported by applicable cases.

While the plaintiff's request for leave to file an amended complaint was overruled, he was permitted to file a motion for leave to file an amended complaint accompanied by the proposed amended pleading and a certification showing that copies thereof had been served upon all moving defendants.

Pursuant to the granted permission, the plaintiff filed what purported to be an amended complaint. The Court denied permission to file and supported the order by a careful memorandum, filed June 9, 1959, not yet reported. It is from the order of dismissal and the order denying leave to file the proffered amended complaint that this appeal is lodged. The infirmities of the original complaint are not dissipated by the amended pleading.

The decision was sound and the challenged orders are Affirmed.

APPELLANT'S DESIGNATION OF RECORD

(Filed June 13, 1960)

The clerk of the United States Court of Appeals for the Sixth Circuit will please prepare a transcript of the record in this cause for transmission, on petition for writ of certiorari, to the clerk of the Supreme Court of the United States and include in said transcript the following items:

1. Appendix, attached to appellant's brief filed in this cause.
2. Judgment entered May 13, 1960.
3. Opinion dated May 13, 1960.
4. This designation of record.

The petition for Writ of Certiorari is being filed in the Supreme Court of the United States pursuant to 28 U.S.C., Sec. 1254 (1), 62 Stat. 928.

The following question is presented on the petition for Writ of Certiorari:

Did the Court of Appeals for the Sixth Circuit err in its affirmance of the Judgment of the United States District Court for the Northern District of Ohio, Eastern Division?

/s/ ADOLPH HOHENSEE
P. O. Box 910
Scranton, Pennsylvania
Appellant

COPY

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 479

[illegible]

Petitioner,

vs.

[illegible] PUBLISHING CO., et al.,

Respondents.

MOTION TO DISMISS OR AFFIRM
OR PETITION FOR CERTIORARI

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Attorney for Respondents The Beacon Journal Publishing Company, Robert Fullerton, John S. Knight, The Knight-Ridder Newspapers, Inc., John G. Green, W. J. Rice, Summit County Federal Savings and Loan Association, and Better Business Bureau of Akron, Inc.

[illegible], May, Bloser & Wortman,
[illegible],
[illegible],
of Counsel.

[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1960.

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ADOLPH HOHENSEE,

Petitioner,

vs.

AKRON BEACON JOURNAL PUBLISHING CO., *et al.*,

Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR CERTIORARI.

The appellees herein respectfully request that this Court deny the petition of the petitioner herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

RESPONDENTS' STATEMENT OF QUESTIONS PRESENTED.

1. Did the Complaint or the Proffered Amended Complaint state facts sufficient to state a cause of action under the Anti-Trust Laws?

2. Even if the Complaint or the Proffered Amended Complaint were well pleaded, did they contain such allegations which constituted a violation of the Anti-Trust Laws?

Both of the Courts below answered the foregoing questions "No."

STATEMENT OF FACTS.

The opinion of the Court of Appeals for the Sixth Circuit reported at 227 F. 2d 359 was a per curiam opinion wherein the Court affirmed the decisions of the District Court, which decisions are reported in 171 F. Supp. 90 and 174 F. Supp. 450. The crux of the decisions both of the Court of Appeals and the District Court was that the Complaint and the Proffered Amended Complaint failed to state facts sufficient to state a cause of action under the Anti-Trust Laws and further that even if the pleadings of the complainant were proper, they would not state a violation of the Anti-Trust Laws.

ARGUMENT.

I. THE PETITIONER CANNOT CLAIM ERROR UNDER RULE 15 (a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The petitioner chose to file a motion with the District Court requesting that his Proffered Amended Complaint be filed. The fact that the petitioner chose to file this motion rather than merely filing his Amended Complaint to which defendants would have filed a motion to dismiss, is of no consequence at this time. Both the District Court and the Court of Appeals found that, as a matter of fact, the Amended Complaint was as defective as the original complaint, and failed to state a cause of action. The issue as to whether the District Court should have ruled as the validity of the Amended Complaint upon the motion of the petitioner or on a motion of the defendant to dismiss such complaint should not be raised at this time since the petitioner chose to request a ruling of the District Court prior to filing his Amended Complaint. Moreover, petitioner has never raised this issue until the present time.

II. THE COURTS BELOW PROPERLY RULED THAT NEITHER THE COMPLAINT NOR THE AMENDED COMPLAINT SET FORTH FACTS SUFFICIENT TO STATE A CAUSE OF ACTION OR SET FORTH ALLEGATIONS WHICH SHOWED A VIOLATION OF THE ANTI-TRUST LAWS.

The petitioner's complaint and amended complaint do not allege facts sufficient to state a violation of the Anti-Trust laws.

It is the basic principle of law that a court will not consider legal conclusions in determining whether a pleading is sufficient to state a cause of action. Petitioner's entire complaint is a combination of numerous generalized allegations that there is, or has existed, a conspiracy among the appellees; that the conspiracy is injurious to him and in restraint of interstate commerce. The entire complaint of the petitioner is devoid of any specific facts which indicate a conspiracy. But one fact is alleged in the entire Amended Complaint, and that is, the appellee, W. J. Hine, threatened to throw appellant out of Canton, Ohio. (Paragraph 5, Amended Complaint.) In addition, petitioner alleges in his Amended Complaint that there were numerous acts of harassment and embarrassment caused to him by the appellees herein. The Amended Complaint states that the appellees "Did slander and cause certain libelous articles to be printed and circulated * * *" (Paragraph 6, Amended Complaint). Are such actions prohibited by the Anti-Trust Laws? Complainant actually has alleged nothing more than that the appellees have been guilty of certain torts, but even in attempting to allege such torts he has failed to allege any facts that would constitute a tort. It is therefore submitted that there are not sufficient facts alleged in either the original complaint or the Amended Complaint of the appellant, which, taken to-

gether, would constitute a cause of action against the appellees under the Anti-Trust Laws.

As stated on page 231, in *Black and Yates vs. Mahogany Association*, 129 F. 2d 227 (3rd Cir., 1941). Certiorari denied, 317 U. S. 672:

> "A general allegation of conspiracy without a statement of facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause of action. Although detail is unnecessary, the plaintiff must plead facts constituting a conspiracy, its object and accomplishment."

In *Glenn Coal Company vs. Dickerson Fuel Company*, 72 F. 2d 885, the Court said the following at 887:

> "Thus it has been held in numerous federal decisions that in a civil suit under this special Act the declaration must allege facts from which the court can determine that there has been a violation of the Act with resultant damage proximately caused thereby to the plaintiff. In Alexander Milburn Co. v. Union Carbide & Carbon Corp. (C. C. A. 4) 15 F. (2d) 678, 680 (certiorari denied, 273 U. S. 757, 47 S. Ct. 459, 71 L. Ed. 876) this Court, by Judge Parker, said:
>
> 'For it is not sufficient that the declaration be framed in the words of the statute, or that it allege mere conclusions of the pleader. It must describe with definiteness and certainty the combination or conspiracy relied on, as well as the acts done which resulted in damage to plaintiff, and in doing so must set forth the substance of the agreement in restraint of trade, or the plan or scheme of the conspiracy or the facts constituting the attempt to monopolize. 1 R. C. L. 87; Cilley v. United Shoe Mach. Co. (C. C.) 152 F. 726; Rice v. Standard Oil Co. (C. C.) 134 F. 464.'"

As pointed out by the Court below, at 71 F. Supp. 92, the law is settled that an Anti-Trust complaint must be in

some degree specific and detailed. See *Bain and Black, Inc. vs. Warren Connelly Co.* 19 F. R. D. 108 (D. C. S. D. N. Y., 1956); *Bader vs. Zurich General Accident and Liability Insurance Co.* 12 F. R. D. 437 (D. C. S. D. N. Y., 1956); *Chas. Rubenstein, Inc. vs. Columbia Picture Corp.* 14 F. R. D. 401 (D. C. Minn., 1953).

Even if the allegations of the petitioner's complaint and proffered amended complaint were properly pleaded, the complaint or amended complaint did not state a violation of the anti-trust laws.

All of the cases cited by the petitioner in support of his petition for a writ of certiorari miss the point which the Courts below attempted to make clear in their decisions. All of the cases cited by the petitioner are cases wherein the Courts have held that a private individual is entitled to relief where he is injured by reason of a combination or conspiracy prohibited by the Anti-Trust Laws. The Courts below have not attempted to hold that a private individual does not have a right of action where there is a violation of the Anti-Trust Laws and that particular individual is injured thereby. The point which the Courts below attempted to make and which the petitioner seems to have misunderstood is that the Complaint and the Amended Complaint did not state a violation of the Anti-Trust Laws. The petitioner has alleged by conclusions, but no facts, that he was injured and further alleged that there was conspiracy, but the conspiracy which he was complaining of was not of the type which the Anti-Trust Laws were meant to prevent. The policy of these laws is basically economic and the purpose of the law is to defeat those practices harmful to the public which naturally result from free competition when businesses attempt to gain advantage over one another. The District Court below in its decision

at 174 F. Supp. 450 quoted *Apex Hosiery Co. v. Leader*, 310 U. S. 469, at 500:

> "* * * this Court has not departed from the conception of the Sherman Act as affording a remedy, public and private, for the public wrongs which flow from restraints of trade in the common law sense, i. e., restriction or suppression of commercial competition. In the cases considered by this Court since the *Standard Oil* case in 1911 some form of restraint of commercial competition has been the *sine qua non* for the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. (Citations.) It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce are not enough, unless the restraint is shown to have or intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition. (Citations.)

The fact is that the complaint does not allege or attempt that the appellees have done that is prohibited by the Anti-Trust laws. The following quotation from *Shockley v. General Electric*, 171 F. 2d 238, at 239 (10th Cir. 1948) is equally applicable to the case at bar:

> "And it further alleged in equally general terminology that the effect of such refusal to furnish parts to plaintiff was substantially to lessen competition and to create a monopoly. But these were general allegations in the nature of conclusions, without any statement of specific acts on the part of the defendants from which it could be determined as a matter of law in

the defendants did in fact violate the Act with resulting damages to plaintiff. The complaint did not allege that the defendants combined and conspired to refrain from competing with each other in the manufacture, sale and distribution of the enumerated commodities. It did not allege that the defendants conspired to raise prices. It did not charge that they combined to divide trade territory. It failed to allege that they conspired to apportion customers. It did not aver that they agreed to furnish the public commodities of inferior quality. And it was barren of any charge that the defendants engaged in any trade practices of that kind in furtherance of a combination or conspiracy. While it was alleged that the refusal to furnish merchandise to plaintiff for sale in connection with the conduct of his business was in furtherance of the conspiracy and that the public was injured, it was not charged generally or specifically that as the result of that refusal the prices of such merchandise were enhanced or that the volume thereof in the competitive markets was diminished. In other words, the complaint failed to allege facts from which it could be determined as a matter of law that a combination or conspiracy was entered into which brought about an increase in prices to the consuming public, a diminution in the volume of merchandise in the competitive markets, a deterioration in the quality of the merchandise available in the channels of commerce, or any other like evil consequence in the free flow of interstate commerce. Instead, the pleading bore clear internal indications of a personal grievance on the part of plaintiff.

Indeed, neither the Complaint nor the Amended Complaint indicate any business motive whatsoever for the alleged conspiracy. The petitioner does not even pretend to contend that the appellees combined to obtain a profit for themselves at the expense of the public, or for that matter, at the expense of the petitioner. It would seem clear that the Anti-Trust Laws were not meant to protect individuals

from any and all conspiracies, but were meant to protect them from those conspiracies prohibited by the Anti-Trust Laws such as price fixing, monopolies, combinations to eliminate competition and numerous others which have been developed by the ingenious imaginations of businessmen.

Particularly pertinent to this case is the following quotation from *Feddersen Motors vs. Ward*, 180 F. 2d 513, 522 (10th Cir., 1950):

> "No facts were alleged from which it could be determined as a matter of law that the contemplated purpose, tendency or inherent nature or result of the conspiracy was that fewer automobiles moved in Interstate Commerce from Detroit, Michigan, into Colorado or other destinations, or that less Hudson automobiles were available for purchase in the market either in Colorado or elsewhere; or that the quality of the Hudson cars was lowered in any manner. The pleading was completely barren of any allegations from which it could be determined as a matter of law that the contemplated purpose, tendency, inherent nature or result of the combination was to bring about any diminution in quantity or deterioration in quality of new Hudson automobiles moving in inter-state commerce and sold to the public. Facts were alleged which tended to show that the conspiracy as contemplated and effectuated harmed plaintiff. But that was not enough. In addition it was essential that the pleading allege facts from which it could be determined as a matter of law that the conspiracy contemplated or tended to restrain interstate commerce with harmful effect to the public interest."

From the above case and those other cases cited by these appellees, it is apparent that the Anti-Trust Laws were enacted for the purpose of preventing economic and

business combinations and conspiracies and not combinations or conspiracies to commit torts against an individual

III. THE PETITIONER HAS FAILED TO INCLUDE IN HIS APPENDIX THE STATUTES INVOLVED IN THIS CASE AS IS NECESSARY UNDER RULE 23(d) OF THE SUPREME COURT RULES.

Rule 23 (d) of the Supreme Court Rules requires a petitioner to include in his Appendix a full quotation of the statute involved in the case. Since petitioner failed to comply with this rule, his petition should be denied.

CONCLUSION.

For the foregoing reasons, it is submitted that the Amended Complaint which incorporates the original complaint fails to state facts which constitute a cause of action under the Anti-Trust Laws and further, even if the legal conclusions alleged by the appellant were acceptable, the Amended Complaint would be inadequate to state a cause of action under the Anti-Trust Laws for the reason that they are based on a misapprehension of the intent and purpose of those laws. It is therefore prayed that the petition herein be dismissed.

Respectfully submitted,

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